Supreme Court, U.S.
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No. 99-1721

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1998

DAVID B. COURTWAY, et al.,
Petitioners,

v.

MEL CARNAHAN, et al.,
Respondents.

On Petition For A Writ of Certiorari to the Missouri Court of Appeals, Western District

RESPONDENTS' BRIEF IN OPPOSITION

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor

MICHAEL L. BOICOURT*
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321

**Counsel of Record*
ATTORNEYS FOR RESPONDENTS

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QUESTION PRESENTED

This case raises the same issue decided in *Sweeney v. Bond*, 519 F. Supp. 124 (E.D.Mo. 1981), *aff'd* 669 F.2d 542 (8th Cir. 1982), *cert. denied* 459 U.S. 878 (1982): Whether political affiliation is an appropriate requirement for the effective performance of the duties undertaken by the fee agents who are appointed by each Director of Revenue on recommendation of the Governor, and who represent the Governor and the Director in cities and towns throughout the State.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD NOT BE GRANTED 7

I. The key questions posed by the petition go to a holding by a Missouri appellate court as to Missouri law and to a finding of fact -- neither of which is an important question of federal law that merits this court's attention. 7

II. Review of the Missouri Court of Appeals decision by this Court would not have general application to other potential litigants 9

III. The Missouri Court of Appeals applied the test established by this Court in a manner that does not conflict with the decisions of any other courts 11

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Branti v. Finkle, supra, 445 U.S. at 517, 100 S.Ct. at 1294 . . . . . 4-6, 9-12

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 29 L.Ed.2d 547 (1976) 12

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed. 2d 874 (1996) 13

Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed. 2d 52 (1990) 12, 13

Sweeney v. Bond, 519 F. Supp. 124, (E.D.Mo. 1981), *aff'd* 669 F.2d 542 (8th Cir. 1982), *cert. denied* 459 U.S. 878 (1982) 2, 3

Sweeney v. Bond, 669 F.2d 542 (8th Cir. 1982) 2

Statutes

Mo. Rev. Stat. §136.055 (1994) 1, 2

Respondents, Mel Carnahan, Governor of the State of Missouri, and Jeanette M. Lohman, Director of the Missouri Department of Revenue, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Missouri Court of Appeals, Western District, in this case. That opinion is reported at 985 S.W.2d 350 (Mo. App. 1999), and is reprinted in the Petition Appendix at App. 1-12.

STATEMENT OF THE CASE

Petitioners have correctly outlined the procedural history of this case. But their characterization of the opinion of the Missouri Court of Appeals, Western District, has been truncated and is incomplete. After citing the Missouri statute that references Department of Revenue fee agents, Mo. Rev. Stat. §136.055 (1994), the Missouri Court of Appeals, Western District concluded that under Missouri law, fee agents can and do perform duties beyond those specified in the statute:

> [I]f the duties of a fee agent were strictly limited to those stated in §136.055, political affiliation would not be an appropriate requirement for the effective performance of the position. However, we disagree with the applicants that we are limited to the statutory duties in §136.055 to determine whether political affiliation was an appropriate requirement for the effective performance of the position of a fee agent.
>
> . . . .
>
> . . . In this respect, §136.055 does not limit the duties of a fee agent to those expressly stated therein. In addition, there are no statutes which prohibit fee agents from performing other duties not expressly contained in §136.055. In fact,

> the record reflects that the position of fee agent has historically encompassed many duties not expressly contained within §136.055. These additional duties were recognized and discussed in *Sweeney v. Bond*, 519 F. Supp. 124 (E.D.Mo. 1981).

Petitioners chose to omit any discussion of the substantial factual record on which the court below relied. That omission could mislead this Court because this matter turns on a unique set of facts -- facts that must be used in the analysis required by the patronage test. A limited recitation of the facts appears in the opinion of the Missouri Court of Appeals. App. 2-4. But the facts are more fully explained in prior federal court decisions.

This case, which arose from a change in party affiliation of the governor in 1993, was not the first in which former Missouri fee agents have attempted to bring their claims to this Court. The last time that the party affiliation of the Governor of Missouri changed was in 1981. Some of the fee agents who were replaced at that time sought the same relief that petitioners have sought in this case -- but they did so in federal, rather than in state court. *See Sweeney v. Bond*, 519 F. Supp. 124, (E.D.Mo. 1981), *aff'd* 669 F.2d 542 (8th Cir. 1982), *cert. denied* 459 U.S. 878 (1982). There were actually three separate cases, decided by three different United States district court judges -- and the State prevailed in all three. *See* 669 F.2d at 544, n.2. The only reported district court decision demonstrates that the courts understood the unique nature of fee agents.

The U.S. District Court for the Eastern District of Missouri explained the "novel status of motor vehicle license fee agents" and how the Missouri statute "supports the argument that the State interest in having such an unusual arrangement is an intentional and planned circumstance,

designed to meet and overcome the shortcomings of most patronage assignments." *Sweeney v. Bond*, 519 F. Supp. at 130. The court went on to explain the job of a fee agent:

> The fee agents have more than five million contacts with the public during their term and do serve as selected emissaries of the incumbent administration and thus reflect its concern for courtesy, efficiency, and integrity. Unlike civil servants who remain during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts. The unique structure of the fee agent position minimized the usual deficiencies of patronage.
>
> First of all, there is little or no additional cost to the government, for the fees of the agents are simply added to the costs of the licenses and taxes, thus allowing the state the full and complete measure of it taxing bounty.
>
> Second, any citizen wanting to avoid the agent's small fee can seek out a branch office or utilize the mails to pay the license fees and taxes without paying the $1.00 fee. He may have to forego the convenience of location or scheduled availability, but that would be a luxury that he could judge the value of and accept or decline.
>
> Third, the requirements for filling the position of fee agent are simple and generic, no special skill or professional knowledge is needed, and thus large numbers of individuals could easily qualify for the posts with little difficulty in completing the work required.

> Fourth, while not requiring the confidential and policymaking function of the top-level positions in state government, there is the responsibility of demonstrating loyalty, efficiency and partisan pride, which could be interpreted as a hallmark of the incumbent administration.
>
> Fifth, the fee holder can delegate practically all of the chores and responsibility of the office to others that he employs, and thus continue to actively and fully participate in the political activities of his choice without the restriction of a civil service code or the loss of services to the state.
>
> Sixth, the novel status of motor vehicle license fee agents supports the argument that the state interest in having such a unusual arrangement is an intentional and planned circumstance, designed to meet and overcome the shortcomings of most patronage assignments.
>
> In summary, then, the fee agents are extraordinarily suited for partisan, political appointment, and may well be a near perfect example of the kind of role suggested in *Branti [v. Finkle, 445 U.S. 507 (1980)]*.

519 F. Supp. at 129-130.

The displaced fee agents next took their case to the U.S. Court of Appeals for the Eighth Circuit. With a record before it that did not differ materially from the record in this case, the Eighth Circuit described fee agents and the political nature of their duties and responsibilities in light of this Court's precedents:

In *Branti v. Finkle, supra*, 445 U.S. at 517, 100 S.Ct. at 1294, the Court stated that "*Elrod* recognize[d] that party affiliation may be an acceptable requirement for some types of government employment." The burden is on the hiring authority to "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518, 100 S.Ct. at 1294. We believe defendants in this case have carried their burden.

The district court held that party affiliation was an appropriate requirement for the position of fee agent because fee agents

> serve as selected emissaries of the incumbent administration and thus reflect its concern for courtesy, efficiency, and integrity. Unlike civil servants who remain during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts. The unique structure of the fee agent position minimizes the usual deficiencies of patronage.

Sweeney v. Bond, supra, 519 F.Supp. at 129.

Fee agents are not required to work in their offices. They are free to delegate duties of the offices to workers hired by the fee agent. Thus fee agents can continue to actively participate in political activities free of their restrictions of a civil service code and without

> interruption of service to the fee agency. There is no cost to the government of the fee agents' service as the cost is borne by the customer. There are 158 fee agent offices in Missouri, the vast majority of which are now operated by Democrats; in 1980 there were over 4.5 million transactions between fee agents and citizens of Missouri. Fee agents are traditionally looked upon as representatives of the incumbent governor. Many spend much of their time in this way and are not restricted in their active pursuit of party politics by the confines of their fee agent offices. We hold that political affiliation is an appropriate requirement of the effective performance of fee agents and has been so regarded by both Democrats and Republicans for many years.

669 F.2d at 546.

During the trial of this case, respondents conclusively demonstrated that all of the facts relied on by those courts in 1981 remain true with respect to the petitioners and the circumstances existing today. That proof is reflected, albeit in summary form, in the decision of the Missouri Court of Appeals. The existence and persuasiveness of the proof is perhaps best shown by petitioners' decision not to address it in their petition, and their decision to argue instead that this Court should grant the petition in order to hold that the Missouri Court of Appeals incorrectly interpreted Missouri law regarding the permissible scope of duties assigned to or assumed by fee agents.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The key questions posed by the petition go to a holding by a Missouri appellate court as to Missouri law and to a finding of fact -- neither of which is an important question of federal law that merits this Court's attention.

Petitioners' argument may be summarized in three sentences: (1) The duties of fee agents are statutorily "limited to the sale of licenses and collection of taxes, as an agent of the department of revenue" (Pet. at 7-8) and cannot be enlarged by the governor or the Director of the Missouri Department of Revenue (Pet. at 8-12). (2) Fee agents, as independent contractors, have protection against "partisan dismissals." Pet. at 5-6. (3) The State cannot invoke the exception to that protection because it did not prove that political party affiliation makes a fee agent "better able to sell motor vehicle licenses and collect motor vehicle sales and use taxes." Pet. at 6-7. Petitioners' argument fails at the outset, for the duties of fee agents are *not* limited to the sale and licenses and collection of taxes.

Petitioners effectively rest their entire argument on the claim that the Missouri Court of Appeals misinterpreted Missouri law in analyzing the duties and responsibilities of fee agents. They argue that the activities of fee agents are circumscribed by the statutory description of the licenses that they issue and the fees and taxes that they collect. But the question of the scope of duties assigned to or assumed by fee agents is solely an issue of state law. There is no reason why this Court should accept review of this case in order to question how a Missouri appellate court interprets Missouri law establishing a position that extends the reach of the Missouri Governor into dozens of locations throughout the state.

Dedicating nearly their entirely argument to an attack on the holding that under Missouri law fee agents can act outside the narrow confines of their statutory mandate, petitioners ignore the findings below (and the findings in prior cases) that fee agents do have a broader roles. In the real world, divorced from the simplicity of black print on the white page of the Revised Statutes of Missouri, fee agents are not merely license issuers and license and tax gatherers. Petitioners implicitly concede that fee agents are a governor's "ambassadors . . . at the grass roots." Pet. App. at 24. To obtain relief from this Court, then, petitioners would have to either reverse course and attack the findings below, or continue down the path of arguing that this Court must reverse a state court holding that under Missouri law an independent contractor who *actually performs* a broad, political role, cannot be displaced by an incoming governor because that performance was beyond the scope of the statute authorizing the contract. Nothing in the petition suggests a rationale for such a step.

Again, Petitioners' argument rests on a state law dispute, *i.e.*, whether Missouri law permits fee agents to have a broader role than the statutes on their face authorize. That is not a federal question, much less an "important federal question." Sup. Ct. Rule 10(a). And whether fee agents actually do have such a broad role is a factual question that petitioners do not even attempt to attack. Petitioners' arguments for certiorari, resting as they do on the inaccurate premises that the fee agents' duties are and must be limited to those in the statute, must fail.

II. Review of the Missouri Court of Appeals' decision by this Court would not have general application to other potential litigants.

To decide whether political affiliation is an appropriate requirement for the duties of Missouri Department of Revenue fee agents, the Missouri courts inquired into the unique nature of the fee agent institution as it exists in the State of Missouri and into the duties actually performed by these independent contractors. The need for such an inquiry is unusual in Missouri; though political affiliation plays a role in the appointment of fee agents, that generally is not true for state contractors, nor for state employees. But more important here, petitioners have not even suggested, much less shown, that there exists, in Missouri or in any other state, a group of independent contractors or public employees who are appointed under similar circumstances, have similar duties and responsibilities, or have traditionally been treated or defined similarly to the petitioners. They have failed to show that this case has any significance beyond the realm of fee agents who were appointed when one party took over in 1983 and wanted to keep those appointments after another party took power in 1993.

The factual circumstances relating to fee agents are unique and peculiar. The unusual responsibilities that have been placed upon fee agents do not have a factual corollary in Missouri or, as far as we know, elsewhere.

Fee agents are appointed by the Director of Revenue upon recommendation of the governor. They provide, among other things, state motor vehicle and drivers' licenses at locations throughout the State. They do so for a fee over and above the license price or tax charged by the Missouri

Department of Revenue. Under Missouri law, the fee agents are entitled to keep that fee as their compensation.

But as concluded by every court to look at the issues presented here, the role of a fee agent does not end with selling licenses or collecting taxes. Fee agents are, and have always been, the governor's political representatives in the geographic areas in which the fee agents serve. *See, e.g., Sweeney*, 519 F. Supp. at 129; 669 F.2d at 546; Petition App. at 20-25. They represent the incumbent governor at the grass roots. Political affiliation, therefore, has always been an important criterion for their selection.

Each of the petitioners had their contract as a Department of Revenue fee agent terminated, after the administration of Governor Mel Carnahan, a Democrat, and his appointed Director of Revenue, began in January 1993. Each of the petitioners is a Republican who was appointed during the 1980's under the administrations of former Governors Christopher S. Bond and John Ashcroft, both Republicans. Petitioners could be appointed as fee agents only because the contracts of the previous fee agents in their communities had been terminated based upon political considerations. These circumstances follow a long-standing pattern and practice with respect to fee agents. Political affiliation "has been . . . regarded" as appropriate requirement for the effective performance of fee agents "by both Democrats and Republicans for many years." *Sweeney v. Bond*, 669 F.2d at 546.

Again, petitioners do not identify any comparable group of public employees or independent contractors in Missouri or in any other state. Therefore, review by this Court would be extremely unlikely to affect other potential litigants. The narrow impact of the decision to be reviewed argues strongly against granting the petition.

III. The Missouri Court of Appeals applied the test established by this Court in a manner that does not conflict with the decisions of any other courts.

The question in this case always was whether political affiliation was an appropriate requirement for the effective performance of the duties of fee agents. Petitioners implicitly admit that the Missouri courts used the appropriate test to answer that question, but explicitly argue that those courts nevertheless incorrectly determined that fee agents fit within the exception established by that test. The Missouri courts' finding that political affiliation is an appropriate requirement for a fee agent is not, however, in conflict with the line of cases that establishes the standard for reviewing patronage dismissals -- a line of cases that requires a fact-intensive study of the nature of the position or contract involved. Nor does it conflict with prior decisions in other courts considering the same or comparable facts.

In neither the proceedings below nor the history of the prior, related cases is there any hint that the decision below was incorrect. Sixteen judges have now reviewed the unique status of fee agents, and not one has concluded that political affiliation is not an appropriate requirement for the duties of those fee agents. Three United States district court judges considered the question in 1981, though only one of those opinions was officially reported. *Sweeney v. Bond*, 519 F.Supp. at 129-130. In 1982, three judges of the United States Court of Appeals for the Eighth Circuit considered it and affirmatively concluded that political affiliation is an appropriate requirement for fee agents. *Sweeney v. Bond*, 669 F.2d at 546. In this case, the trial judge reached the same conclusion, Petition App. 15-34, and three judges on the Missouri Court of Appeals agreed, Petition App. 1-12. After separate briefs and argument en banc

before seven judges, the Missouri Supreme Court implicitly approved that conclusion by retransferring this case to the Court of Appeals for issuance of the opinion and mandate. Petition App. 43.

Petitioners' claim that those judges were all wrong, and that there is a conflict with federal law, relies, again, on frequent reiterations of their claim that a fee agent cannot perform duties other than those specified in the statute, and on brief ridicule of the role of a fee agent as "Goodwill ambassador of the Governor." Pet. at 10-11. Though the petition refers to the evolution of the law regarding dismissals of employees and contractors for partisan political reasons, it fails to identify an error or conflict that merits this Court's review.

Petitioners' recitation of the law begins in 1976, when, for the first time, this Court determined that public employees were not universally subject to termination on the basis of their political beliefs. *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 29 L.Ed.2d 547 (1976). In *Elrod*, this Court listed as exceptions from its general patronage prohibition in public employment only policy-making employees and employees serving the appointing authority in a confidential capacity. Four years later in *Branti v. Finkle*, 445 U.S. 507, 100 S.Ct. 1287, 630 L.Ed. 2d 574 (1980), this Court determined that an assistant public defender's retention could not properly be conditioned on his allegiance to a particular party. There, however, the Court clarified the standard for analyzing the validity of patronage terminations of public employees:

> [T]he ultimate inquiry is not whether the label 'policy maker' or 'confidential' fits a particular position, [but] rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for

> effective performance of the public office involved.

445 U.S. at 519.

In 1990, this Court extended its line of patronage decisions to include hiring, promotions, and transfers. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed. 2d 52 (1990). But even there, the issue was clearly stated in terms of the legal standard established by *Branti*. The Court held that "promotion, transfer, recall or hiring decisions involving public employment positions *for which party affiliation is not an appropriate requirement* should be prohibited." 497 U.S. at 68 (emphasis added). Again, the Court excluded what the courts below found here: positions for which party affiliation *is* an appropriate requirement.

Finally, in 1996 the Court applied the prohibition against patronage practice to some independent contractors. *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed. 2d 874 (1996). But even there, this Court began by reaffirming the *Branti* test, *i.e.*, by recognizing that political affiliation may be a reasonably appropriate requirement of the job in question. 116 S.Ct. at 2357. Thus, after *O'Hare* both employees and independent contractors can still be displaced because of their political affiliation *if* affiliation is an appropriate requirement, given the nature of the work being performed.

Despite their recitation of the case law, petitioners do not suggest that the courts below chose the wrong standard. They merely claim that the Missouri courts erred in applying that standard to the peculiar institution of Missouri Department of Revenue fee agents. They point to no decision by any court, considering positions at all comparable to those of Missouri's

fee agents, with which the decision of the Missouri Court of Appeals even arguably conflicts.

Again, the petition ultimately rests on an alleged error in a Missouri court's holding that fee agents can, under Missouri law, do more than sell licenses and collect taxes. That is not a question of federal law that merits review.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor

MICHAEL L. BOICOURT*
Assistant Attorney General
Missouri Bar No. 20840
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

**Counsel of Record*

Attorneys for Respondents